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2009 DEC 10 AM 10:34

JEANNE HARRIS, CLERK

BY: N. Seguin

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION *IN LIMINE* TO PRECLUDE
THE USE OF EVIDENCE DISCLOSED IN
VIOLATION OF ARIZONA RULE OF
CRIMINAL PROCEDURE 15.1 AND THIS
COURT'S ORDERS

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion *In Limine* to Preclude the Use of Evidence Disclosed in Violation of Arizona Rule of Criminal Procedure and this Court's Orders and requests that Defendant's Motion be denied. Contrary to Defendant's allegation, the State has not violated either Rule 15.1 or this Court's Orders regarding disclosure. The State's position is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The State is in absolute agreement with one statement from Defendant's Motion. The State is currently investigating and will continue to investigate the offenses for which

1 Defendant has been charged. To do otherwise would be a blatant disregard for the duties and
2 responsibility accorded to the County Attorney's Office by the State of Arizona for the fair
3 administration of the law and to insure that justice is done.

4 ***I. The Court granted the State's request for additional time to disclose the victim's***
5 ***financial and divorce records.***

6 This Court has issue two deadlines regarding the State's disclosure. The first was
7 issued May 12, 2009, when the Court ordered the State to disclose everything within its
8 possession at that time by June 22, 2009. At the conclusion of a hearing on June 23, 2009, the
9 State informed the Court that it had nearly completed disclosure but advised that two discs
10 which contained Carol Kennedy's financial and divorce records still needed to be reviewed and
11 redacted. The two discs contained YSCO Evidence No. 1200 through 1204 and YCSO
12 Evidence No. 1206 and 1207. The State requested additional time to complete the task. The
13 Court granted the State's request allowing two additional weeks, until July 7, 2009, to complete
14 that disclosure. (See Exhibit A – Minute Entry dated June 23, 2008.) The items in question
15 were disclosed in the State's 23rd Supplemental Disclosure on July 6, 2009, within the time
16 frame allowed by the Court.
17

18 ***II. Defendant's request for preclusion of all evidence disclosed after June 22, 2009, is***
19 ***legally unsupported and without merit.***

20 Defendant's request that the Court preclude the State from using any of items disclosed
21 from after June 22, 2009, because the material was disclosed in an untimely manner is
22 extremely disingenuous. With the exception of Evidence Items 1200-1204 and 1206-1207,
23 nothing disclosed after June 22, 2009 was in the State's possession on May 12, 2009.

24 Defendant's concedes that the October 2, 2009, deadline was specific to evidence the
25 State would attempt to admit at the *Chronis* Hearing. Although Defendant claims the State
26

1 ignored this Order, he fails to specify even one piece of evidence out of the dozens that were
2 submitted during the Hearing that was not disclosed prior to the October 2nd deadline. Clearly,
3 Defendant's claim regarding the State's disregard for the October 2nd deadline is without merit.

4 As to Defendant's specific claims:

- 5
6 1. **Bates Nos. 6826-10174:** These are YCSO Evidence Items 1200-1204 and 1206-
7 1207; Carol's financial and divorce records. The Court allowed the State an
8 additional two weeks, until July 7, 2009, to complete disclosure on these items.
The documents were included in the State's 23rd Supplemental Disclosure dated
July 6, 2009.
- 9 2. **Bates Nos. 10822-12951:** These documents were originally disclosed as scanned
10 documents saved on disc as YCSO Evidence Item 551, sent to Big Picture for
11 reproduction on June 15, 2009, and listed on the State's 18th Supplemental
12 Disclosure dated June 15, 2009. The original scanned documents on Evidence Item
551 lacked Bates Nos. The documents were re-disclosed with Bates Nos. with the
State's 36th Supplemental Disclosure dated October 8, 2009.
- 13 3. **Bates Nos. 10371-10546:** These are YCSO Evidence Item 5012, were received by
14 the County Attorney's Office on July 30, 2009, and disclosed in the State's 27th
Supplemental Disclosure dated August 3, 2009.
- 15 4. **Bates Nos. 10181-10241:** This is YCSO Evidence Item 1503, a black journal, was
16 seized from Unit G-04 during execution of a search warrant on several storage units
17 on July 7, 2009. Copies were received by the County Attorney's Office on July 9,
2009, and provided to Defendant in the State's 24th Supplemental Disclosure dated
July 15, 2009.
- 18 5. **Bates 10235:** This document, email correspondence dated July 13, 2009, with
19 response dated July 14, 2009, was provided to Defendant in the State's 25th
20 Supplemental Disclosure dated July 28, 2009.
- 21 6. **YCSO Evidence Item 6127:** These electronically recorded interviews were
22 apparently transcribed by YCSO but were inadvertently saved to a computer and
23 neither the interviews nor the transcripts were copied or entered into evidence.
However, detailed accounts of the interviews were included in YCSO DR
24 Supplement 15 which was disclosed to Defendant in the State's 2nd Supplemental
25 Disclosure dated November 24, 2008. (See Bates Nos. 1888-1891.) As soon as the
error was discovered, the items were located, entered into evidence, and disclosed.
(State's 39th Supplemental Disclosure dated November 3, 2009.)
- 26 7. **YCSO Evidence Item 70:** This disk was originally sent to Big Picture for
reproduction December 3, 2008, and received by Defendant on December 9, 2008.

1 This same disk was accidentally included in a batch of disks sent to Big Picture for
2 reproduction on November 3, 2009.

- 3 **8. YCSO Evidence Item 81:** This disk was originally sent to Big Picture for
4 reproduction on November 20, 2008, and listed in the State's 2nd Supplemental
5 Disclosure dated November 24, 2008. As with Disk 70, this disk was accidentally
6 included in a batch of disks sent to Big Picture for reproduction on November 3,
7 2009.

8 *Ariz. R. Crim. P.*, Rule 15.6(a) mandates that each party has a continuing duty to make
9 additional disclosure of new or different information as it is discovered. In the Minute Entry
10 dated June 3, 2009, the Court acknowledged that "[t]he State has a continuing obligation to
11 make disclosure in a timely fashion." (See Exhibit B.) The state cannot be ordered to disclose
12 items under Rule 15.1(b) that it does not yet have in its possession. *See Ariz. R. Crim. P.*, Rule
13 15.1(b); *State v. Newell (Milagro)*, 221 Ariz. 112, 210 P.3d 1283 (App. 2009). Rule 15.6(b)
14 allows on-going disclosure up to 30 days before trial. Only when disclosure is anticipated to be
15 made after that time is the disclosing party required to notify the court and other parties of the
16 date the disclosure will be available. Rule 15.6(c) provides that, unless otherwise permitted,
17 the final deadline for disclosure is at least seven days prior to trial.

18 As this Court is aware, disclosure in this case is vast. The State is currently compiling
19 its 41st Supplemental Disclosure which will bring the total document count to well over 16,000.
20 In addition to the documents, the State has disclosed dozens of disks containing digitally
21 recorded interviews, data, and photographs. The State expects additional material, the majority
22 in response to subpoenas *duces tecum*, which will be disclosed as soon as practically possible.
23 Moreover, there are additional evidentiary items that have yet to be submitted for scientific
24 testing. Once these items are tested, the process will result in the generation of additional
25 scientific case files, i.e., bench notes, notes, photographs, charts, graphs, emails and other
26

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1 correspondence. Again, these items will be disclosed as soon as possible after they are
2 received.

3 **CONCLUSION:**

4 Defendant's claim that the State has violated or ignored either *Ariz. R. Crim. P.*, 15.1
5 or the Court's Orders regarding disclosure deadlines is clearly overstated and without merit.
6 Defendant's Motion to Preclude the Use of Evidence based upon a violation of either should
7 be denied.
8

9 RESPECTFULLY SUBMITTED this ⁷⁶10 December, 2009.

11 Sheila Sullivan Polk
12 YAVAPAI COUNTY ATTORNEY

13 By: 

14 Joseph C. Butner
15 Deputy County Attorney

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1 COPIES of the foregoing delivered this
2 10th day of December, 2009 to:

3 Honorable Thomas J. Lindberg
4 Division 6
5 Yavapai County Superior Court
6 (via email)

7 John Sears
8 107 North Cortez Street, Suite 104
9 Prescott, AZ 86301
10 Attorney for Defendant
11 (via email)

12 Larry Hammond
13 Anne Chapman
14 Osborn Maledon, P.A.
15 2929 North Central Ave, 21st Floor
16 Phoenix, AZ
17 Attorney for Defendant
18 (via email)

19 By: Deb Cornell
20
21
22
23
24
25
26

STATE'S EXHIBIT A

Minute Entry dated June 23, 2008

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

DIVISION 6

HONORABLE THOMAS B. LINDBERG

CASE NO. CR 2008 1339

JEANNE HICKS, CLERK

BY: M. J. Merlitz, Deputy

DATE: June 23, 2009

FILED

Date: June 23, 2009

5:00 O'Clock P.M.

JEANNE HICKS, CLERK

BY: M. J. Merlitz

DEPUTY

TITLE:

STATE OF ARIZONA,

Plaintiff,

-vs-

STEVEN CARROLL DEMOCKER,

Defendant.

COUNSEL:

Yavapai County Attorney (e)

By: Joseph Butner

(For Plaintiff)

John Sears

Larry Hammond

Anne Chapman

OSBORN MALEDON, P.A.

2929 North Central Avenue, 21st Floor

Phoenix, AZ 85012

(For Defendant)

HEARING ON:

Oral Argument

NATURE OF PROCEEDINGS

COURT REPORTER

Roxanne Tarn

START TIME: 10:37 a.m.

APPEARANCES: Joseph Butner, Deputy County Attorney
Steven Carroll Democker, Defendant (in custody)
John Sears, Counsel for Defendant

This is the time set for oral argument on pending motions. The Court notes that three motions are pending for argument today and certain others have been withdrawn. The pending motions are: Motion to Compel Defendant to Provide to the State the Password to his Verizon Blackberry, Motion for an *in Camera* Inspection of Digital Images on a Memory Card Taken from Defendant's Camera, and Motion for a Court Order for Release of Divorce Documents.

With regard to inspection of the memory card, the Court is advised that the photographs on the memory card are not relevant. Counsel for the State requests that the photographs on the card not be returned but rather be destroyed. After discussion, defense counsel indicates he has no objection to the photographs, which are on the memory stick, being destroyed. The Court accepts the stipulation and directs the State to destroy them.

Argument is presented on State's Motion for a Court Order for Release of Divorce Documents. Both counsel and Christopher Kottke, attorney for the Estate of Carol Kennedy address this issue as well as the Assertion of Attorney-Client Privilege Pertaining to Release of Records filed by Mr. Kottke.

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State vs. Steven Carroll Democker

June 23, 2009

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The Court **DENIES** the motion for the Court to Order release of divorce documents. The Court notes that since the privilege has been asserted, the Court does not have any more authority to waive it on behalf of the deceased than Mr. Frugé would have the authority to waive the attorney-client privilege unilaterally without consent of the client. The Court notes that Mr. Kottke and his client are independent legal agents for the estate and for the deceased and they can choose to assert or to waive the privilege as they may in the best interest of the client whose privileges are to be protected by the attorney-client privilege.

Mr. Kottke is excused.

The Motion to Compel with regard to the password-protected Blackberry is addressed.

The Court notes this is testimonial and communicative of ideas that the Court thinks is covered by the Fifth Amendment; and that this is neither something authorized by Rule 15 for the Court to require and even if Rule 15 did, there are still Fifth Amendment issues which the Court thinks are problematic for the Court's granting of the motion.

The Court **DENIES** the Motion to Compel Defendant to produce the password for the Verizon Blackberry. Recognizing, as well the assertions made that there was some attempt in the past to provide such information and the assertion indeed that we don't have any other passwords at this point that we remember that would be able to assist the Court in any event-- so it's an impossibility claim as well being presented by the defense. The Court's full comments are as noted on the record.

Counsel for the State advises the Court of the voluminous disclosure provided to defense yesterday. Counsel also advises that there are two discs containing Carolyn Kennedy's financial and divorce records that still need to be reviewed and redacted before they are released to defense. Counsel asks for leave of Court to have an additional two weeks to complete the redaction process and provide that disclosure to the defense. Defense counsel notes his concerns for the record.

The Court **GRANTS** the State's request with regard to that particular information and gives the State until July 7th to complete that disclosure.

Defense counsel advises the Court that he has sent to the State a list of a dozen witness names he would like to interview. Counsel for the State indicates the interviews will be scheduled and completed.

END TIME: 11:04 a.m.

cc: Victim Services (e)

STATE'S EXHIBIT B

Minute Entry dated June 3, 2008

w/o

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA (Plaintiff) vs. STEVEN CARROLL DEMOCKER (Defendant)	Case No. CR 2008-1339 COURT ORDER clarifying: Minute Entry Order Entered on May 12th, 2009	FILED DATE: <u>JUN 03 2009</u> <u>1</u> O'Clock <u>9</u> M. JEANNE HICKS, CLERK BY: <u>S. Sharma</u> Deputy
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HONORABLE Thomas B. Lindberg	BY: Martha Wolfinger / Judicial Assistant Division Six
DIVISION SIX	DATE: June 3rd, 2009

The Court by this Order clarifies the Minute Entry entered May 12, 2009. Therein, conflicting disclosure deadlines apparently were set for the State. On page one, the disclosure deadline was "60 days from (May 12, 2009)." On page two, the minute entry says the State is to produce what it has in its possession no later than June 22, 2009.

In keeping with the recent decision of *State v Newell (Milagro)*, --- Ariz. ---, --- P.2d --- (1 CA-SA 09-0052, Court of Appeals filed June 2, 2009), the Court clarifies that the disclosure deadline of discoverable information in its possession is June 22, 2009. The State has a continuing obligation to make disclosure in a timely fashion subject to possible sanctions under Rule 15. But, as *Newell* makes clear, the deadline set pertains to information in the State's possession, not to testing or analysis reports which have not yet been concluded and/or produced.

DATED this 3rd day of June, 2009.



The Honorable Thomas B. Lindberg
Yavapai Superior Court / Division Six

cc: Joseph C. Butner III, Esq., Office of the Yavapai County Attorney (via e-mail this date)
(e) John M. Sears, Esq., 107 North Cortez Street, Suite 104, Prescott, Arizona 86301 (via e-mail and facsimile this date to 928-445-1472)
Larry A. Hammond, Esq., Anne M. Chapman, Esq., Osborn Maledon, P.A., 2929 North Central Avenue, 21st Floor, Phoenix, Arizona 85012-2793 (via e-mail and facsimile this date to: 602-640-6076)
Victim Services: Attn. Marie Martinez

JUN 03 2009